Majlis Daerah Dungun v Tenaga Nasional Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S1-21-81 OF 1996
MOHD NOOR AHMAD J
24 DECEMBER 1997

Civil Procedure *— Affidavits — Affidavit-in-reply not filed within 14 days — Whether affidavit ought to be rejected — Applicability of O 32 r 13(2) — Construction of sub-r (1) vis-a-vis sub-r (2) of r 13 — Rules of the High Court 1980 O 32 r 13(1) & (2)*

The plaintiff filed a writ against the defendant and filed an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') with affidavit in support. On 23 September 1996, the defendant filed and served an affidavit-in-reply. The defendant then filed an application under O 18 r 19 of the RHC to strike out the writ and the statement of claim with affidavit in support. On 12 March 1997, the plaintiff filed an affidavit-in-reply ('the said affidavit'). The plaintiff then filed notice of intention to use the said affidavit at the hearing of its O 14 application. The defendant raised a preliminary objection against the use of the said affidavit. It was contended that as the plaintiff was served with the defendant's affidavit-in-reply to the plaintiff's affidavit in support of the O 14 application on 23 September 1996, the plaintiff should have filed and served the said affidavit within 14 days from 23 September 1996 as required under O 32 r 13(2) of the RHC. Since there was a delay of more than five months, the said affidavit ought to be rejected. The senior assistant registrar dismissed the preliminary objection. The defendant appealed. The issue before the court was whether the plaintiff was entitled to use the said affidavit (which was filed for the purpose of the application under O 18 r 19 of the RHC) at the hearing of the O 14 application by merely giving notice to the defendant of its intention to do so.

Held, dismissing the appeal:

The plaintiff was entitled to resort to the procedure provided for under O 32 r 13(1)(a) of the RHC. By virtue of the phrase 'Save as otherwise provided in these rules' appearing in sub-r (2), the subrule does not apply to any provisions to the contrary, in particular to the procedure in sub-r (1) of r 13. Subrule (2) applies only to an affidavit in support of an application in chambers and to an affidavit-in-reply to the affidavit in support of such application but not to subsequent affidavit, otherwise the subrule would have expressly provided so. The procedure laid down in sub-r (1) appears to be expeditious and supplementary to the purpose of sub-r (2). That is the only construction that can be given to sub-r (2) in order to harmonize sub-rr (1) and (2). Any other construction would result in the non-application of sub-r (1) under any circumstances and would lead to absurdity. Therefore, the issue on the alleged delay need not be considered (see pp 711C–I and 712A–B).

A **[Bahasa Malaysia summary**

Plaintif telah memfailkan satu writ terhadap defendan dan memfailkan satu permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dengan afidavit menyokong. Pada 23 September 1996, defendan memfailkan dan
B menyampaikan afidavit jawapan. Defendan kemudiannya memfailkan satu permohonan di bawah A 18 k 19 KMT bagi membatalkan writ dan pernyataan tuntutan dengan afidavit menyokong. Pada 12 Mac 1997, plaintif memfailkan afidavit jawapan ('afidavit tersebut'). Plaintif kemudiannya memfailkan notis tentang hasrat untuk menggunakan afidavit tersebut di pembicaraan permohonannya di bawah A 14.
C Defendan membangkitkan bantahan permulaan terhadap penggunaan afidavit tersebut. Ia dihujahkan bahawa oleh kerana plaintif disampaikan dengan afidavit jawapan defendan kepada afidavit plaintif bagi menyokong permohonan A 14 pada 23 September 1996, plaintif sepatutnya memfailkan dan menyampaikan afidavit tersebut dalam
D tempoh 14 hari dari 23 September 1996 seperti yang dikehendaki di bawah A 32 k 13(2) KMT. Memandangkan terdapat kelewatan selama lebih daripada lima bulan, afidavit tersebut patut ditolak. Penolong kanan pendaftar telah menolak bantahan permulaan. Defendan merayu. Isu di hadapan mahkamah adalah sama ada plaintif berhak menggunakan afidavit tersebut (yang difailkan untuk tujuan
E permohonan di bawah A 18 k 19 KMT) di pembicaraan permohonan A 14 dengan hanya memberikan notis kepada defendan tentang hasratnya untuk berbuat demikian.

Diputuskan, menolak rayuan:

F Plaintif berhak menggunakan prosedur yang diperuntukkan di bawah A 32 k 13(1)(a) KMT. Disebabkan ungkapan 'Kecuali diperuntukkan selainnya dalam kaedah-kaedah ini' yang menonjol dalam sub-k (2), subkaedah tersebut tidak terpakai kepada mana-mana peruntukan yang bercanggahan, khususnya kepada prosedur dalam sub-k (1)
G k 13. Subkaedah (2) hanya terpakai kepada suatu afidavit menyokong permohonan dalam kamar dan kepada afidavit jawapan kepada afidavit yang menyokong permohonan demikian tetapi tidak kepada afidavit berikutnya, jika tidak subkaedah tersebut sudah tentu akan memperuntukkan begitu secara nyata. Prosedur yang dinyatakan dalam sub-k (1) nampaknya cepat dan cekap dan tambahan kepada
H tujuan sub-k (2). Itulah satu-satunya tafsiran yang boleh diberikan kepada sub-k (2) bagi mengharmonikan sub-kk (1) dan (2). Apa-apa tafsiran lain akan mengakibatkan ketidakpemakaian sub-k (1) di bawah mana-mana keadaan lain dan akan membawa kepada keadaan yang tidak munasabah. Maka, isu atas kelewatan yang dikatakan
I tidak perlu dipertimbangkan (lihat ms 711C–I dan 712A–B).]

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168 (refd)

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)

Standard Chartered Bank Malaysia Bhd v Eng Song Huat [1996] 1 MLJ 446 (refd)

Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 18 r 19, O 32 r 13(1), (2)

Goh Peng Hong (*Bakar & Partners*) for the appellant/defendant.
Jayanthi Pillay (*Kadir Tan & Ramli*) for the respondent/plaintiff.

Cur Adv Vult

Mohd Noor Ahmad J: The defendant appealed against the decision of the learned senior assistant registrar which dismissed its preliminary objection against the use of the affidavit of one Abdullah Hazawi bin Jaffar affirmed on 10 March 1997 ('the said affidavit') by the plaintiff in the proceeding under O 14 of the Rules of the High Court 1980 ('the RHC'). The objection was grounded on the delay in filing the said affidavit contrary to O 32 r 13(2)(b) of the RHC. I dismissed the appeal and hence this appeal.

Briefly, by a writ filed on 5 July 1996, the plaintiff claimed against the defendant, inter alia, a sum of RM31,625,000 being the arrears of assessment in respect of the Paka Power Station owned by the defendant. On 9 September 1996, the plaintiff filed an application for summary judgment under O 14 of the RHC with the support affidavit affirmed by one Abdullah Hazawi bin Jaffar (per encls (3) and (2)). On 23 September 1996, the defendant filed and served two affidavits in reply (per encls (12) and (14)). On 6 February 1997, the defendant filed an application under O 18 r 19 of the RHC together with an affidavit in support to strike out the writ and the statement of claim (per encls (22) and (20)). On 12 March 1997, the plaintiff filed an affidavit-in-reply, which is the said affidavit (per encl (28)). On 13 March 1997, the plaintiff filed two notices of its intention to use firstly, the said affidavit at the hearing of its O 14 application and secondly the affidavit in support of its application under O 14 of the RHC (encl (2)) at the hearing of the defendant's application under O 18 r 19 of the RHC, of which the defendant were duly notified (per encls (27) and (26)) the hearing of O 14 application was proceeded first on 18 March 1997 where the preliminary objection was raised.

The defendant contended that as the plaintiff was served with the defendant's affidavits in reply (encls (12) and (14)) to the plaintiff's

affidavit in support of the O 14 application (encl (2)) on 23 September 1996, the plaintiff — if it intended to reply to the defendant's affidavits in reply — should have filed and served it within 14 days from 23 September 1996 as required under O 32 r 13(2) of the RHC. Hence, there was a delay of more than five months calculated from 23 September 1996 when the defendants affidavits in reply were served on the plaintiff to 12 March 1997 when the said affidavit was filed. In having filed and served the notice of intention to use the said affidavit at the hearing of the O 14 application, the plaintiff was attempting to circumvent the requirement of O 32 r 13(2) of the RHC. Therefore, the said affidavit ought to be rejected.

The issue before me is whether the plaintiff is entitled to use the said affidavit (which was filed for the purpose of the application under O 18 r 19 of the RHC) at the hearing of the O 14 application by the plaintiff merely giving notice to the defendant of its intention to do so? My view is that the plaintiff is entitled to resort to the procedure provided for under O 32 r 13(1)(a) of the RHC.

Rule 13(1) reads:

> Any party —
>
> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
>
> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
>
> must give notice to every other party of the filing or, as the case may be, of his intention to do so.

And r 13(2) provides:

> Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It is evident that by virtue of the phrase 'Save as otherwise provided in these rules' appearing in sub-r (2), the application of the subrule does not apply to any provisions to the contrary, in particular to the procedure in sub-r (1) of r 13. Subrule (2) applies only to an affidavit in support of an application in chambers and to an affidavit-in-reply to the affidavit in support of such application but not to subsequent affidavit, otherwise the subrule would have expressly provided so. There is no doubt that the subrule was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavit at the last minute (see *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 at p 470H); and that it may be argued that the interpretation that I have given to the subrule may once again give rise to the mischief that the enactment had intended to eradicate. However, to

my mind, the purpose of the enactment can still be maintained because the procedure laid down in sub-r (1) appears to be expeditious and supplementary to the purpose of sub-r (2). That is the only construction that can be given to sub-r (2) in order to harmonize sub-rr (1) and (2). Any other construction would result in the non-application of sub-r (1) under any circumstances and would lead to absurdity.

The defendant's counsel cited the following cases in support of his argument:

(i) *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85;

(ii) *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453;

(iii) *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446;

(iv) *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168; and

(v) *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678.

With respect, my view is that those cases are not relevant for the present consideration. They are generally concerned with the filing and service of the affidavits that fall within the ambit of sub-r (2) of r 13 of O 32 of the RHC, whereas in the case before me, it involves the construction of sub-r (1) vis-a-vis sub-r (2) of r 13. Hence, the issue on the alleged delay need not be considered.

Therefore, the appeal is dismissed with costs.

Appeal dismissed.

Reported by Jafisah Jaafar